UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GAL SPIEGLER, :

Plaintiff, :

REPORT & RECOMMENDATION

-against- :

22 Civ. 8774 (PAE) (GWG)

MISH MISH INC., et al., :

Defendants. :

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GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Plaintiff Gal Spiegler brings the instant claims against defendants Mish Mish Inc. ("Mish Mish") and Mishelle Weinerman alleging breach of contract and violations of the New York Labor Law, N.Y. Lab. §§ 195.1, 195.3, and seeking an accounting and inspection of books and records under New York common law and New York's Business Corporation Law, N.Y. Bus. Corp. § 624. See First Amended Complaint, filed Mar. 28, 2023 (Docket # 19) ("FAC"). Defendants now move to dismiss plaintiff's amended complaint.[1] For the reasons that follow, defendants' motion should be granted in part and denied in part.

I. FACTS AS ALLEGED IN THE COMPLAINT

For purposes of this motion to dismiss, we assume the facts as alleged in the complaint to be true.

Mish Mish is a company controlled by Weinerman which is in the business of "transforming job descriptions from textual to visual." FAC ¶¶ 7, 9. In March 2019, Weinerman

[1] Notice of Motion, filed May 11, 2023 (Docket # 26) ("Mot."); Memorandum of Law in Support, annexed as Ex. 5 to Mot. (Docket # 26-5) ("Def. Mem."); Memorandum of Law in Opposing [sic], filed June 20, 2023 (Docket # 29) ("Pl. Opp."); Reply Memorandum of Law, filed July 17, 2023 (Docket # 32) ("Def. Reply").

offered Spiegler the role of Chief Technology Officer ("CTO") of Mish Mish, along with a 35% equity ownership stake in the company. Id. ¶ 10. Spiegler accepted. Id. ¶ 11. Weinerman negotiated an employment agreement with Spiegler (the "Agreement"), which Spiegler signed on December 15, 2019, and which Weinerman countersigned "as Chief Executive Officer" of Mish Mish. Id. ¶¶ 16-18.

The Agreement included the following language pertaining to the location from which Spiegler was to perform his work:

> The Employee shall provide Services under this Agreement and operate out of the offices of Company, and from virtual offices, including the Employee's home, as needed from time to time, but the Employee's primary office shall be the Company office . . . provided, however, that the Employee agrees to be available, where requested and where necessary to perform the Services and his or her duties.

Employment Agreement, annexed as Ex. A to FAC (Docket # 19) ("Agreement"), ¶ 4. [2]

The Agreement also contained the following provision:

> This Agreement contains the entire agreement of the parties hereto relating to the subject matter hereof and supersedes all prior agreements and understandings with respect to such subject matter, and the parties hereto have made no agreements, representation or warranties relating to the subject matter of this Agreement that are not set forth herein.

Id. ¶13.

The employment offer embodied in the Agreement was "contingent upon [Spiegler's] receipt of a nonimmigrant visa to the United States of America . . . within one [] year of the

[2] Spiegler has annexed a copy of the Agreement as an exhibit to his First Amended Complaint. Accordingly, we may consider it on a motion to dismiss. See Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002) ("[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.") (quoting Int'l Audiotext Nework, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995)).

Effective Date," and Spiegler's compensation was to be "held in abeyance until such receipt of visa." Agreement ¶ 6(a); FAC ¶¶ 20-21. On February 26, 2020, Spiegler obtained a visa. Id. ¶ 22.

Between March 2020 and September 2020, Spiegler performed work on behalf of Mish Mish. See id. ¶¶ 24-27, 34-35. Spiegler did not receive any salary from Mish Mish between December 2019 and September 2020, and "often complained to Weinerman" about the lack of pay. Id. ¶¶ 30, 32. In response to these complaints, Weinerman "repeatedly personally assured . . . Spiegler that he would get paid his salary." Id. ¶ 33.

In December 2019, Spiegler and Weinerman had agreed that Mish Mish would "pivot" to "create a new platform called SecretSauce." Id. ¶ 15. In October 2020, Weinerman informed Spiegler that a potential client was interested in acquiring Mish Mish. Id. ¶ 36. In "early 2021" the firm Alvarez & Marsal "gave Weinerman $1,000,000 to start a division" that would use Mish Mish's "SecretSauce" platform. Id. ¶¶ 37-38. Weinerman "has not given . . . Spiegler any distribution or profit sharing" after receiving that payment. Id. ¶ 39.

Spiegler filed this action on October 14, 2022. See Complaint, filed Oct. 14, 2022 (Docket # 1). On February 9, 2023, defendants moved to dismiss, see Notice of Motion, filed Feb. 9, 2023 (Docket # 11), but withdrew that motion upon the filing of the First Amended Complaint, see Memorandum Endorsed, dated Mar. 27, 2023 (Docket # 18). Defendants then filed the instant motion.

II. LEGAL STANDARD

A party may move to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) where the opposing party's pleading "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). While a court must accept as true all of the allegations

contained in a complaint, that principle does not apply to legal conclusions. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (citation, internal quotation marks, and brackets omitted). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," Iqbal, 556 U.S. at 678, and thus a court's first task is to disregard any conclusory statements in a complaint, id. at 679.

Next, a court must determine if a complaint contains "sufficient factual matter" which, if accepted as true, states a claim that is "plausible on its face." Id. at 678 (citation and internal quotation marks omitted); accord Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007) ("[A] complaint must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion."). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (citations and internal quotation marks omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a complaint is insufficient under Fed. R. Civ. P. 8(a) because it has merely "alleged" but not "'show[n]' . . . 'that the pleader is entitled to relief.'" Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

III. DISCUSSION

Plaintiff's amended complaint pleads five causes of action: breach of contract relating to defendants' failure to pay plaintiff's salary, FAC ¶¶ 40-46; a demand for access to Mish Mish's books and records under N.Y. Bus. Corp. §§ 624(b), (e) and New York common law, id. ¶¶ 47-52; a demand for an accounting under New York common law, id. ¶¶ 53-57; and two counts relating to defendants' failure to provide documentation under New York Labor Law, id. ¶¶ 58-63. Defendant has moved to dismiss each count, see Mot., and plaintiff has consented to the dismissal of the fourth and fifth counts, raised under New York Labor Law, see Pl. Opp. at 15. We address the remaining counts next.

A. Breach of Contract

Defendants raise two arguments as to Spiegler's breach of contract claim. First, that defendant Weinerman should be dismissed, because she was not a party to the Agreement. See Def. Mem. at 11-12. Second, that Spiegler fails to state a claim on which relief may be granted because he has not pleaded that he fully performed his obligations under the contract. See id. at 10-11. We address each argument next.

1. Liability of Weinerman

Defendants argue that all claims should be dismissed as to Weinerman because the Agreement "reflects that the only parties to the agreement are plaintiff and Mish Mish — not Weinerman personally." Id. at 12. Spiegler responds that Weinerman may be held liable for Mish Mish's non-payment because "Weinerman personally negotiated the Agreement[,] . . . she signed the Agreement as CEO[,] and she repeatedly personally assured . . . Spiegler that he would get paid his salary." Pl. Opp. at 11-12.

Under New York law, a contract generally "cannot bind a non-party unless the contract was signed by the party's agent, the contract was assigned to the party, or the signatory is in fact the 'alter ego' of the party." Malmsteen v. Univ. Music Grp., Inc., 940 F. Supp. 2d 123, 135 (S.D.N.Y. 2013) (citation omitted); accord Arcadia Biosciences, Inc. v. Vilmorin & Cie, 356 F. Supp. 3d 379, 390 (S.D.N.Y. 2019).[3] Although there are circumstances in which a corporate officer may be personally liable for a contract to which the corporation is the party, "[u]nder New York law, an agent who signs an agreement on behalf of a disclosed principal will not be individually bound to the terms of the agreement 'unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal.'" Integrated Mktg. & Promotional Sol., Inc. v. JEC Nutrition, LLC, 2006 WL 3627753, at *3 (S.D.N.Y. Dec. 12, 2006) (quoting Lerner v. Amalgamated Clothing & Textile Workers Union, 938 F.2d 2, 5 (2d Cir. 1991)); accord Am. Builders & Contractors Supply Co. v. CR1 Contracting, LLC, 565 F. Supp. 3d 330, 343 (W.D.N.Y. 2021). "To determine whether there is the requisite 'clear and explicit' evidence that an agent intended to bind himself personally to a contract, the Second Circuit, applying New York law, has set forth five factors that courts should consider: (1) the length of the contract; (2) the location of the liability provisions in relation to the signature line; (3) the presence of the signatory's name in the agreement itself; (4) the nature of the negotiations leading to the contract; and (5) the signatory's role in the corporation." TR 39th St. Land Corp. v. Salsa Distr. USA, LLC, 2013 WL 3090441, at *6 (S.D.N.Y. June 18, 2013) (citing Mason Tenders Dist. Council Welfare Fund v. Thomsen Constr. Co., 301 F.3d 50, 53 (2d Cir. 2002)).

[3] By its terms, the Agreement is governed by New York law. See Agreement ¶ 12.

We need not delve into these factors at length, because "[a] corporate officer who signs on behalf of the corporation is not liable unless he signs as an individual (in addition to signing as the corporate representative)." Bonnant v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 467 F. App'x 4, 11 (2d Cir. 2012) (summary order) (emphasis in original). Plaintiff here alleges only that Weinerman signed the Agreement "as Chief Executive Officer." FAC ¶ 17. Under New York law, this is fatal to plaintiff's claim, as it concedes that Weinerman did not sign in her individual capacity.

Plaintiff nonetheless argues that Weinerman may be held liable because she later "guaranteed payment" on the Agreement. Pl. Opp. at 11. The amended complaint, however, alleges merely that Weinerman "personally assured" Spiegler that he would be paid. FAC ¶ 33. There is no allegation that Weinerman's assurance involved an undertaking to pay Spiegler with her own money. The complaint thus fails to satisfy New York's rigorous requirement that the enforcing party show a corporate officer's "clear and explicit" intend to be bound by the company's contract. The complaint also fails to allege that Weinerman made this promise in writing, which is required for any promise of this kind. See Mercator Corp. v. Windhorst, 159 F. Supp. 3d 463, 471 (S.D.N.Y. 2016) ("[Defendant's] alleged commitment to 'stand personally behind' the contract would constitute an oral guarantee that would be unenforceable under the Statute of Frauds[.]"); Sigala v. Spikouris, 2014 WL 294155, at *6 (E.D.N.Y. Jan. 24, 2014) ("Absent any writing demonstrating an intent by [defendant] to guarantee the debt, the plaintiff's claim against [defendant] for that amount is barred."); see generally N.Y. Gen. Obl. § 5-701(a)(2) (a "special promise to answer for the debt, default or miscarriage of another person" is void unless made in writing). The Agreement likewise requires that all amendments be "made in writing and signed by the parties." Agreement ¶ 14.

Plaintiff argues that courts have allowed similar claims to proceed "if allegations exist [that] the individual guaranteed payment," citing Consac Indus. v. LDZ Comercio Importacao e Exportacao LTDA, 2002 WL 31094855 (E.D.N.Y. Aug. 29, 2002), Jacobson v. Televida, Inc., 2005 WL 3609101 (E.D.N.Y. Aug. 10, 2005), and Taboola, Inc. v. RedOrbit, Inc., 2017 WL 5725510 (N.Y. Sup. Ct. Nov. 17, 2017). Pl. Opp. at 11. Neither Jacobson nor Taboola involves an alleged guarantee made, as here, after the signing of the contract, and in any event both cases are inapposite. In Jacobson, the contract at issue contained a "personal guarantee provision," 2005 WL 3609101 at *5, which is not present in the Agreement. In Taboola, the court found that the defendant could be held personally liable where his "personal signature" appeared on the contract and plaintiff had alleged the existence of "email exchanges that purport[ed] to bind [defendant] individually to [the company's] debts." 2017 WL 5725510, at *2. Neither condition is applicable here, where Weinerman signed the contract "as Chief Executive Officer," and there are no other writings alleged to exist that show Weinerman's express intention to be bound individually. See FAC ¶¶ 17, 32-33.

Consac could be read to hold that it is enough to require a trial on liability where a plaintiff alleges that an individual defendant "personally negotiated the terms of [the contract]; made more than one trip to [plaintiff's] New York headquarters to personally promise that [the defendant company] would pay its debt to [plaintiff] and to ask that [plaintiff] not terminate [the contract]; and served as [plaintiff's] contact at [the company]." 2002 WL 31094855, at *4. We have difficulty reconciling Consac — a 21-year-old case — with the clear requirements of New York law regarding the liability of a corporate agent, and the cases it cites do not support the

ruling.[4] Moreover, Consac appears to consider the cited actions only in order to interpret whether at the time of signing, an officer intended to be bound by the corporation's contract. See, e.g., id. at *5 (discussing factors that indicate whether defendant "intended to sign the document in his official capacity only"). Here, by contrast, plaintiff concedes Weinerman signed the contract in a representative capacity. See FAC ¶ 17.

Because plaintiff has not alleged evidence that could demonstrate Weinerman's clear and explicit intent to be bound by the Agreement, plaintiff's claims against Weinerman must be dismissed.

2. Sufficiency of Claims

As to the sufficiency of Spiegler's breach of contract claim, defendants argue that Spiegler failed to plead that he satisfied all of the provisions in his contract and was therefore entitled to no compensation under the Agreement. Def. Mem. at 10. They contend that the Agreement was "expressly contingent upon [Spiegler's] receipt of a nonimmigrant visa" and "required that . . . [Spiegler] operate out of the offices of [the] Company," but that Spiegler fails

[4] For example, in Cement & Concrete Workers Dist. Council Welfare Fund, Pension Fund , Legal Services & Annuity Fund v. Lollo, 35 F.3d 29 (2d Cir. 1994), a company entered into an agreement stating that the corporate representative signed "in a dual capacity" in which the signer "agree[d] to be personally bound," that a notice was "prominently displayed immediately above the signature line," and that the personal guarantee was "bargained for and reached after much negotiation." 35 F.3d at 35. In Thomsen Construction, the Second Circuit considered a case in which a company entered into an 18-page contract containing a personal guarantee clause, in which the signature line listed the signer's title and indicated that he was signing on behalf of the company. See 301 F.3d at 52. Noting that New York law "requires that there be clear and explicit evidence of the defendant's intent" to be personally bound, the Second Circuit found that "the high degree of intention . . . was not met" under these circumstances. Id. at 53-54. Likewise, in Lerner, there was a personal guarantee clause in a contract signed by an executive on behalf of the company. Lerner noted that "New York courts have found individual liability only in rare cases" and that in the face of "far from overwhelming" evidence of an intent to assume individual liability, it was error for the District Court to enforce the contract against the signer. 938 F.2d at 4-6.

to allege that he performed his duties in Mish Mish's New York offices. Id. (punctuation omitted).[5]

The clause allowing Mish Mish to "h[o]ld in abeyance" Spiegler's compensation is contingent only on Spiegler's receipt of a visa — not on his work in the New York offices, nor even on his use of the visa. See Agreement ¶ 6(a) ("The employment offer in this Agreement is contingent upon Employee's receipt of a nonimmigrant visa to the United States of America, permitting Employee to work per this Agreement, within one (1) year of the Effective Date. Compensation under this Agreement shall be held in abeyance until such receipt of visa. If Employee does not receive this visa, this Agreement shall retroactively terminate as of the Effective Date, and no compensation shall be due under this Agreement."). Spiegler alleges that he received the visa within one year of the execution date. See FAC ¶¶ 19, 22.

Defendants also argue that plaintiff has failed to "plausibly allege that [he] performed [his] own obligations under the agreement," because plaintiff does not allege that he performed his duties in the Mish Mish offices as required by the Agreement. Def. Mem. at 10. They argue that this was a material term of the contract and thus compliance with this provision had to be pled in the complaint. Def. Reply at 4-5.

The provision requiring in-person work appears in Paragraph 4 of the Agreement. Agreement ¶ 4. Mish Mish's argument is that because the agreement "contained" this

[5] Mish Mish asserts that Spiegler "did not" work out of the New York Offices and attaches an affidavit from Weinerman to this effect. Def. Mem. at 10. We do not consider any factual contentions in the affidavit as they go outside the four corners of the complaint and we need not consider them on a motion to dismiss. See Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); see also Nunes v. Cable News Network, Inc., 31 F.4th 135, 142 (2d Cir. 2022) ("[Plaintiff's] theory . . . is unsupported by the allegations of the complaint, to which we are limited on a motion to dismiss.").

requirement and it was "not buried amongst some boilerplate in the agreement," it is necessarily "material" and thus the complaint had to plead compliance with it. Def. Reply at 5.

We reject this argument. Case law holds that "[i]n order to survive [a] motion to dismiss on a breach of contract claim, a plaintiff must allege the existence of a contract, performance of that contract by one party, breach by the other party, and resulting damages." Grayson v. Ressler & Ressler, 271 F. Supp. 3d 501, 521 (S.D.N.Y. 2017) (citing Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525 (2d Cir. 1994)). Here, plaintiff has alleged the Agreement's existence, FAC ¶ 16, that he performed work for defendants under the Agreement, id. ¶¶ 24-25, 27, 35, and that he was not paid under that Agreement, id. ¶ 30. These allegations plead a prima facie case for breach of contract.

Where a plaintiff is alleging a breach of contract, "a plaintiff must set forth the material terms of the agreement, including the particular terms that were allegedly breached by the defendants," in order to plead liability. Grayson, 271 F. Supp. 3d at 521. But "a plaintiff has no obligation to anticipate and refute potential affirmative defenses." Rosen v. Brookhaven Cap. Mgmt., Co., 194 F. Supp. 2d 224, 227 (S.D.N.Y. 2002) (citing Harris v. City of N.Y., 186 F.3d 243, 251 (2d Cir. 1999)); accord S.E.C. v. Glob. Inv. Strategy UK Ltd., 2021 WL 4896127, at *7 (S.D.N.Y. Oct. 19, 2021). And the defense of "material breach," or, in other words, that a party should be "discharged from the further performance of its obligations" because the counterparty has failed to perform an action at "the root of the contract," see In re Lavine, 114 F.3d 379, 387 (2d Cir. 1997) (quotation omitted), is an affirmative defense, see, e.g., 3B Assocs. LLC v. eCommission Sol., LLC, 214 A.D.3d 526, 526 (1st Dep't 2023) (listing "prior material breach" as an affirmative defense); UBS Sec. LLC v. Angioblast Sys., Inc., 2012 WL 987356, at *5 (N.Y. Sup. Ct. Jan. 30, 2012) (same); Tyson Foods, Inc. v. Keystone Foods Holdings Ltd., 2022

WL 970515, at *1 (S.D.N.Y. Mar. 31, 2022) (same). In other words, a plaintiff is not required to anticipate a defendant's argument that plaintiff's own action or failure to act was a "material" breach of the contract. Additionally, at this stage, a court must "draw all reasonable inferences in plaintiff's favor to determine whether the allegations plausibly give rise to an entitlement to relief." Panther Partners Inc. v. Ikanos Commc'n, Inc., 681 F.3d 114, 119 (2d Cir. 2012). Here, there is a "reasonable inference" that the location of plaintiff's work was not a material part of the parties' bargain. As a result, plaintiff was not required to plead his compliance with this provision.

In any event, as case law reflects, "the question of the materiality of a breach 'is usually a question of fact and should be decided as a matter of law only where the inferences are certain.'" Orlander v. Staples, Inc., 802 F.3d 289, 298 (2d Cir. 2015) (quoting VFS Fin., Inc. v. Falcon Fifty LLC, 17 F. Supp. 3d 372, 380 (S.D.N.Y. 2014)); see State St. Glob. Adv. Tr. Co. v. Visbal, 2023 WL 4053170, at *40 (S.D.N.Y. June 16, 2023) ("Whether a failure to perform constitutes a 'material breach' turns on several factors, such as the absolute and relative magnitude of default, its effect on the contract's purpose, willfulness, and the degree to which the injured party has benefitted under the contract. And under New York law, the question of the materiality of a breach is usually a question of fact and should be decided as a matter of law only where the inferences are certain."). The Court cannot infer from the pleadings that Spiegler's failure to work from Mish Mish's offices, if shown, would be a material breach of the Agreement.

In sum, because plaintiff has pleaded the essential elements of breach of contract, the breach of contract claim (the First Cause of Action) as to Mish Mish should not be dismissed.

B. Access to Records and Accounting

Defendants argue that plaintiff's claims relating to Mish Mish's business records and for an accounting --- the Second and Third Causes of Action --- should be dismissed because his "allegation that he is a shareholder . . . is highly implausible," Def. Mem. at 16, on the ground that his alleged ownership interest is not reflected in the Agreement and thus "the merger clause . . . should bar his claim." Def. Mem. at 16. Plaintiff responds that "a signed equity agreement is not necessary to have equity in a company," and argues that his allegation that he is a 35% shareholder in Mish Mish suffices on a motion to dismiss. Pl. Opp. at 13-14. [6]

Plaintiff's claims for an accounting and for access to records arise under New York statutory and common law. See FAC ¶¶ 47-57. Under New York's Business Corporation Law, any "shareholder of record" may "examine . . . [the corporation's] minutes of the proceedings of its shareholders and record of shareholders," and on written request, the corporation must provide to any shareholder "an annual balance sheet and profit and loss statement for the preceding fiscal year, and, if any interim balance sheet or profit and loss statement has been distributed to its shareholders or otherwise made available to the public, the most recent such interim balance sheet or profit and loss statement." N.Y. Bus. Corp. §§ 624(b), (e). Under New York common law, "[t]he mere existence of a fiduciary relationship gives rise to a claim for an accounting." Dawes v. J. Muller & Co., 176 A.D.3d 473, 474 (1st Dep't 2019). "[S]hareholders in a close corporation[] owe fiduciary duties to one another," which "supports [a] claim for an

[6] Defendants also contend that plaintiff's claim under New York law for access to records should be dismissed because such a claim may only be brought in New York Supreme Court as a special proceeding. Def. Mem. at 16. We are aware of no federal court that has addressed such a claim — brought under N.Y. Bus. Corp. § 624 — on the merits, nor any that has dismissed such a claim as improperly brought in federal court. We do not rule on whether this section bars relief in this Court, however, because we find that plaintiff has not pleaded an ownership interest in the company.

accounting." Unitel Telecard Distr. Corp. v. Nunez, 90 A.D.3d 568, 569 (1st Dep't 2011). Thus, the parties agree that plaintiff's grounds for both forms of relief rely upon his allegation that he was a shareholder in Mish Mish. See Def. Mem. at 15; Pl. Opp. at 13-14.

The complaint alleges that Spiegler is a "minority shareholder" in Mish Mish, by virtue of a "35% ownership interest" he alleges he received in connection with his employment. FAC ¶ 12. Defendants contend that Spiegler's allegation is "implausible" and is rendered meaningless by the Agreement's merger clause. See Def. Mem. at 16.

"In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the court is to accept as true all facts alleged in the complaint." Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 237 (2d Cir. 2007). However, "[i]f a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control[s], and the court need not accept the allegations in the complaint as true." TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 592 (S.D.N.Y. 2013); accord BYD Co. v. VICE Media LLC, 531 F. Supp. 3d 810, 817 (S.D.N.Y. 2021). As such, we look to whether the Agreement contradicts Spiegler's allegation that he was granted an ownership share in the company.

The amended complaint alleges that "[i]n March 2019, Weinerman offered [p]laintiff Spiegler to join Mish as Chief Technology Officer and receive a 35% equity ownership stake in Mish Mish" which "Spiegler accepted." FAC ¶¶ 10-11. The Agreement, executed nine months later, states only that Spiegler "shall receive salary, bonus and any additional compensation at the rate and on the terms set forth in Schedule A." Agreement ¶ 2. Schedule A to the Agreement lists Spiegler's salary and a policy for expense reimbursement, but makes no reference to an ownership stake. See Agreement, Schedule A. Because the Agreement does not reference the 35% stake, we consider the effect of the merger clause on the prior offer.

"A merger clause is a provision of a contract signifying that the contract is a complete statement of the parties' agreement, superseding any prior oral or written terms. In other words, a merger clause operates to limit the universe of the parties' contractual obligations to the text of the contract itself." FIH, LLC v. Found. Cap. Partners LLC, 920 F.3d 134, 143 (2d Cir. 2019). But even "general merger clauses stating that the later contract supersedes 'all prior agreements' only supersede an earlier contract to the extent that the agreements conflict." Shehadeh v. Horizon Pharma USA, Inc., 2021 WL 4176254 at *3 (S.D.N.Y. Sept. 14, 2021) (collecting cases) (punctuation and citation omitted). "When determining if a particular provision is superseded by a provision in a subsequent contract, courts look to (1) whether there is an integration and merger clause that explicitly indicates that the prior provision is superseded; (2) whether the two provisions have the same general purpose or address the same general rights; and (3) whether the two provisions can coexist or work in tandem." Dewitt Stern Grp., Inc. v. Eisenberg, 257 F. Supp. 3d 542, 581-82 (S.D.N.Y. 2017) (quotation marks and citation omitted).

Here, there is a merger clause, which states: "This Agreement . . . supersedes all prior agreements and understandings with respect to [the] subject matter" and that it "contains the entire agreement of the parties." Agreement ¶ 13. The Agreement undoubtedly has the "same general purpose" as the alleged oral offer, since both concerned Mish Mish's retention and compensation of Spiegler as CTO. See FAC ¶¶ 10-11; Agreement. Finally, the two provisions cannot coexist. The Agreement states that it describes the "salary, bonus and any additional compensation" for Spiegler's employment in an annexed "Schedule A." Agreement ¶ 2. That Schedule A contains no reference to equity ownership. Agreement, Schedule A. Spiegler's allegation that he was awarded an ownership share in Mish Mish in connection with his hiring cannot be reconciled with the signed Agreement.

Plaintiff appears to argue that he became a shareholder at the moment he accepted the offer of a 35% stake in Mish Mish, notwithstanding the later merger clause, and notwithstanding the fact that he does not allege that he had performed any work at the time. See Pl. Opp. at 13. Both the laws of New York, where Mish Mish is headquartered, FAC ¶ 4, and Delaware, where it is incorporated, id., generally require that issuance of stock must be reflected in a written document. See Grimes v. Alteon, 804 A.2d 256, 258 (Del. 2002) (Delaware law "establishes a policy that commitments regarding the issuance of stock must be approved in writing by the board of directors."); accord Bank of Am. v. Emert, 2010 WL 2595087, at *3 (S.D.N.Y. June 28, 2010); see also Christian v. TransPerfect Glob., Inc., 2018 WL 4571674, at *5 (S.D.N.Y. Sept. 24, 2018) ("To the extent the Amended Complaint alleges an oral promise to issue stock that is unapproved by the board, the laws of New York and Delaware hold such contract voidable but subject to the possibility of ratification."). Nonetheless, it is also true that "[t]he mere fact that a corporation did not issue any stock certificates does not preclude a finding that a particular individual has the rights of a shareholder." Zwarycz v. Marnia Constr., Inc., 130 A.D.3d 922 (2d Dep't 2015); accord Kun v. Fulop, 71 A.D.3d 832 (2d Dep't 2010); Blank v. Blank, 256 A.D.2d 688 (3d Dep't 1998)). And although oral promises for equity are unenforceable, "an act within the corporation's authority that is effectuated in an unenforceable manner, is voidable, rather than void." Christian, 2018 WL 4571674, at *6. Under circumstances similar to those here, therefore, courts have found that where a company's board acquiesces in an otherwise unenforceable promise, that promise may be given force. See id.

However, Christian — upon which plaintiff himself relies for the proposition that "a signed equity agreement is not necessary to have equity in a company," Pl. Opp. at 13 — also identifies the elements that must be present in order for a promise of equity to be enforceable.

"In the case of a promise for equity in a business, the promise must convey the nature of the obligation, including the amount, the timing, and the source of payment." Christian, 2018 WL 4571674, at *7 (collecting cases). Plaintiff fails to allege that each of these requirements were satisfied in the alleged promise of equity here. Although he identifies the percentage, FAC ¶ 10, he does not identify the source or the time frame in which this equity was to be granted. Nor is it obvious that this would have occurred at a particular time given that plaintiff pleads that Weinerman offered this stake in conjunction with the CTO role, but Spiegler did not assume that role until nine months after the alleged offer. Because there is no written offer and plaintiff has not alleged the necessary terms of the oral offer, his pleadings do not establish that Spiegler had an ownership interest in Mish Mish before he started his employment.[7]

In sum, because Spiegler has failed to plead facts that demonstrate his status as a shareholder in Mish Mish, his claims for an accounting and for access to records should be dismissed.

Conclusion

For the foregoing reasons, defendants' motion to dismiss (Docket # 26) should be granted in part and denied in part. Plaintiff's Second, Third, Fourth, and Fifth Causes of Action should be dismissed entirely, and the First Cause of Action, for breach of contract, should be dismissed as to defendant Weinerman.

[7] The amended complaint also alleges that after Spiegler started his employment, in August 2020, a law firm sent him "corporate formation documents" for her "review" that included a "founders agreement" reflecting a 35% ownership stake for Spiegler. FAC ¶¶ 26, 28. But the amended complaint does not allege that this document --- sent explicitly for "review" --- was ever actually executed or otherwise put into final form. Additionally, the amended complaint fails to describe the terms of the document. Thus, these allegations also fail to show Spiegler held shares in Mish Mish.

PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file any objections. See also Fed. R. Civ. P. 6(a), 6(b), 6(d). A party may respond to any objections within 14 days after being served. Any objections and responses shall be filed with the Clerk of the Court. Any request for an extension of time to file objections or responses must be directed to Judge Engelmayer. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; Fed. R. Civ. P. 6(a), 6(b), 6(d); Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

Dated: October 11, 2023
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge